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Fedex Freight East, Inc. and Tommy Grass. Case 13–CA–40188

January 31, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On July 22, 2003, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief to the Respondent's exceptions and brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions only to the extent consistent with this decision, and to adopt the recommended Order. We adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) by suspending and discharging Tommy Grass. However, we do so solely by application of *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir.1981), *cert. denied* 455 U.S. 898 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

We agree with the judge that the Respondent knew of Grass' union activities and that its decision to suspend

and discharge Grass was motivated by antiunion animus. Thus, we find that the General Counsel met his initial burden of showing that the suspension and discharge of Grass were unlawful.

We also agree that the Respondent failed to satisfy its *Wright Line* burden by demonstrating that it would have suspended and discharged Grass even in the absence of Grass' union activities. The Respondent claimed that Grass was discharged for lying in his paperwork about missed deliveries on April 30, 2002, for lying in conjunction with an inquiry into the missed deliveries, and additionally for lying "about his whereabouts on Company time." Credited evidence adduced at the hearing, some of it undisputed, belies these reasons. Grass' undisputed testimony is that the failure of deliveries on April 30 had several causes, among them the misloading by Respondent's employees of Grass' truck on that day, and a delay encountered by Grass at an earlier delivery at Thomas Dodge.³ The judge credited Grass' testimony that he recorded the inaccurate reason for the nondeliveries—that the addressee-companies were "[c]losed after 3:00 p.m."—in his paperwork upon the instruction of dispatcher (and statutory supervisor) Chris Merritt. The Respondent also claimed that Grass falsely reported that he was on his (unpaid) lunchbreak from 1:18 to 1:47 p.m., in apparent contradiction of his statement that he was making a stop at Auburn Corporation between 1:41 and 1:47 p.m. Grass explained that he carries his lunch with him and "cut his lunch short because of the workload." The Respondent did not produce evidence contravening Grass' testimony.⁴

We find, therefore, that the reasons given by the Respondent for suspending and discharging Grass were false and pretextual, and that the Respondent has not shown that it would have taken these actions in the absence of Grass' union activities. Thus, we adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act.⁵

¹ In exceptions, the Respondent contends that the judge erred by failing to consider the testimony of witness Stuart Baxter, Respondent's divisional human resources manager, in support of Respondent's *Wright Line* defense to the unfair labor practice allegations regarding the suspension and discharge of Charging Party Grass. We have carefully examined the evidence provided by Baxter and find no merit to this exception. Terminal Manager Art Hollrah made the decision to suspend and terminate Grass. Baxter reviewed Hollrah's decision without conducting any further investigation. In this circumstance, the judge properly accorded greater weight to Hollrah's testimony regarding the specific events culminating in Grass' suspension and discharge.

Further, we note that the judge admitted into evidence a portion of R. Exh. 15, a document prepared in anticipation of trial, listing disciplinary events purportedly showing that the Respondent suspended and discharged employees under similar circumstances. The judge excluded as irrelevant only evidence of discipline that occurred *after* Grass was disciplined. The judge heard Baxter's testimony regarding Respondent's underlying business records purportedly used in developing Exh. 15, and plainly, he considered this evidence. It is far from clear that Baxter's testimony and, for that matter, R. Exh. 15, establish that the listed discipline occurred in comparable circumstances to Grass' case. The Respondent did not except to the judge's ruling to strike portions of Exh. 15 relating to discipline meted out after Grass' suspension and discharge.

² In the absence of exceptions, we adopt, the judge's dismissal of the 8(a)(1) allegation regarding a threat of plant closure.

³ Grass called dispatcher (and statutory supervisor) Merritt to report the problem, and Merritt told Grass that the stop "would be erased from the computer." The judge observed, and we agree, that this would explain why the stop did not show up on Grass' paperwork.

⁴ Drivers are instructed to fill out a separate report to indicate that they have not taken a lunchbreak. Grass did not recall whether he filled out the form on April 30. The Respondent did not produce such a form for Grass on April 30, and asserted that it does not, in the ordinary course of business, retain these reports.

⁵ We do not find merit in the Respondent's exception that, because Grass did not fully utilize the Respondent's internal grievance procedure, the Board lacks jurisdiction over the suspension and discharge of Grass.

The Respondent's answer to the complaint did not raise this defense. The Respondent did not adduce evidence as to the procedure itself or how it operates. Nor did it argue the point in its brief to the judge. It is

Accordingly, we find it unnecessary to rely on the judge's analysis under *Kidde, Inc.*, 294 NLRB 840 (1989), and *Supershuttle of Orange County, Inc.* 339 NLRB 1 (2003).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Fedex Freight East, Inc., Chicago Heights, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. January 31, 2005

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Claire Vujanovic, Esq., for the General Counsel.
William A. Blue Jr., Esq., of Nashville, Tennessee, and *Michael D. Giles, Esq.*, of Birmingham, Alabama, for the Respondent.
Tommy Grass, the Charging Party, pro se.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case, under the National Labor Relations Act (the Act), was tried before me in Chicago, Illinois, on May 19–20, 2003. On May 10, 2002, Tommy Grass, an individual, filed the charge in Case 13–CA–40188 under Section 10(b) of the Act alleging that FedEx Freight East, Inc. (the Respondent), has engaged in unfair labor practices as set forth in the Act. Upon an investigation of that charge, which was subsequently amended by Grass, the General Counsel issued a complaint, and an amended complaint, alleging that the Respondent had violated Section 8(a)(1) of the Act by threatening its employees and that the Respondent had violated Section 8(a)(3) of the Act by suspending and discharging Grass, its employee.¹ The Respondent duly filed answers

therefore not surprising that the judge did not address the point. The Respondent, in its exceptions, nonetheless raised the judge's failure to address the point. However, other than reciting the fact that Grass did not exhaust the process, the Respondent made no legal argument for its view that the Board lacks jurisdiction here. In these circumstances, we find no merit to the Respondent's exceptions.

¹ Sec. 7 of the Act provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargain-

ing or other mutual aid or protection." Sec. 8(a)(1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Sec. 8(a)(3) provides that it is an unfair labor practice for an employer "by discrimination . . . to encourage or discourage membership in any labor organization."

admitting that this matter is properly before the National Labor Relations Board (the Board) but denying the commission of any unfair labor practices.

Upon the testimony and exhibits entered at trial,² and after consideration of the briefs that have been filed, I make the following findings of fact and conclusions of law.

I. JURISDICTION AND LABOR ORGANIZATION STATUS

As it admits, at all material times the Respondent, a corporation, has been engaged in the business of interstate transportation of freight from its facility in Chicago Heights, Illinois. During the year preceding the issuance of the original complaint, the Respondent, in conducting those business operations, derived gross revenues in excess of \$50,000 for the transportation of freight from within Illinois directly to points outside Illinois. Therefore, at all material times the Respondent has been an employer that is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent further admits, at all material times International Brotherhood of Teamsters, Local 710 (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. The General Counsel's case-in-chief

The Respondent (formerly known as American Freightways) operates two terminals in the Chicago area, one at Chicago Heights and one at Summit, Illinois, where it employs local and long-distance truck drivers. On December 17, 2001,³ the Union filed a petition with the Regional Director seeking to represent the Summit drivers; on December 20, the Union filed a petition seeking to represent the Chicago Heights drivers. By letter dated December 28, the Union withdrew the petition for the Chicago Heights drivers; by letter dated January 30, the Union withdrew the petition for the Summit drivers. Grass was a local (or city) driver at the Summit terminal from June 3, 1996, until he transferred to the newly constructed Chicago Heights terminal in March 2001. Grass remained at the Chicago Heights terminal until his discharge on May 15, 2002. Art Hollrah, terminal manager, was Grass' immediate supervisor at Chicago Heights, although the Respondent admits that one Chris Merritt, city dispatcher, was also a supervisor within Section 2(11)

² Certain passages of the transcript have been electronically reproduced; some corrections to punctuation have been entered. Where I quote a witness who re-starts an answer, and that re-starting is meaningless, I sometimes eliminate without ellipses words that have become extraneous; e.g., "Doe said, I mean, he asked . . ." becomes "Doe asked . . ."

³ Unless otherwise indicated, all dates subsequently mentioned are between September 1, 2001, and May 15, 2002.

of the Act. Hollrah reported directly to David Boyle, a vice president of the Respondent.

The Union's first unsuccessful attempt to organize the Respondent's truckdrivers came in 1997 when the Respondent's only terminal in the Chicago area was at Summit. Grass was on the Union's organizing committee in 1997, and he then wore Union buttons on his hat and jacket while at work. In September, Grass signed a Union authorization card and began speaking in favor of a renewed organizational effort to other drivers at the Summit and Chicago Heights locations, but there is no evidence that any supervisor observed those activities. (Grass did not wear Union buttons in 2001.)

Tammy Despalto is the Respondent's human resources representative at the Chicago Heights terminal, and she is an admitted supervisor within Section 2(11). Grass testified that on December 29 he and Despalto had a conversation at Bally's Health Club in Chicago where he and Despalto (and Despalto's fiancée-then-husband) often worked out. Grass' friend Anthony (Tony) Geanopoulos was also present. According to Grass:

Tony and I were walking into the free-weight room and Tammy was standing there, and she approached us, took off her headphones and she shook her head side to side and said, "Tommy, you're making a big mistake with this union thing." . . .

I said that we didn't start this. Management did back in 1997 . . .

Tammy said that unions are corrupt, they need your monthly dues, they put companies out of business, they spend their money on themselves.

And I said to Tammy, "You know, that's not true."

And Tammy . . . said, "Well, Tommy, if you vote the Union in, they'll close the facility." . . .

And I said, "Well, Tammy, they can't close the facility because it's owned by shareholders."

And Tammy said, "Well, they'll reroute the freight."

And I said, "Well, in [American Freightways's employee handbook] it says the drivers follow the freight. . . . So if they move the freight from one facility to another, we can follow the freight."

When asked if Geanopoulos was present throughout this exchange, Grass replied, "I believe so." Based on this testimony by Grass, the amended complaint alleges that, in violation of Section 8(a)(1), "Respondent, by Tammy Despalto, at Bally's Health Club, threatened its employees with plant closure if they selected the Union as their bargaining representative." The amended complaint, however, places the date at January 12. This discrepancy is explained by the fact that, as Grass acknowledged on cross-examination, Grass had originally told the General Counsel in two pretrial affidavits that were prepared by regional office investigators, and in one statement that Grass prepared himself, that the exchange upon which the General Counsel bases the allegation happened on January 12.

The General Counsel called Geanopoulos who testified that "two or three weeks before" New Year's Day, he was present when Despalto approached Grass and said that "you guys . . . are making a big mistake with this union thing." (aff) Grass

responded that the employees needed a union and Grass gave Despalto "reasons why." Geanopoulos further testified that Despalto did reply to Grass' statement of reasons, but he (Geanopoulos) did not hear that reply because, "I continued my workout."

Grass further testified that he engaged in several conversations through late January with Despalto. In some of them, he argued that the employees could receive several benefits from affiliation with the Union. In late January, he also brought to Despalto a copy of a newspaper article that was critical of the Respondent's labor relations policies. On the article was pasted a large "UNION YES" sticker.

Grass further testified that in early January he and city dispatcher Merritt got into a heated argument in which Merritt accused Grass of consuming more clock time than necessary to do certain work. At the conclusion of the argument, Merritt chided Grass by stating: "What are you mad [about]? Because the Union didn't get in?" Grass responded that the differences between them had nothing to do with the Union.

In late January Grass was taken off his regular route and placed on another. In early February, Grass complained to Boyle about the change. In response, according to Grass:

Dave Boyle said that he didn't like my attitude there. He said that I was unhappy and he didn't like to see me unhappy. Dave went on and said that he'd rather see me leave the Company and go somewhere else where I'll be happy.

And Dave said, "I'm not going to have you stay here and ruin this Company. And you know what I'm talking about."

Grass testified that he replied that he had worked hard for 5-1/2 years, "and this is the thanks I get." Boyle concluded the conversation by stating that he would look into the route change. Shortly thereafter, Grass was restored to his regular route and the complaint makes no discrimination allegation about the change. (And no separate Section 8(a)(1) allegation is made about Boyle's remarks to Grass.)

Grass drove his (old) route on April 30 and May 1. Grass testified that on May 2, Hollrah called Grass into his office and told him to "write a statement on what happened on April 30th." Grass replied that "that was two days ago," but he did sit down and write something out from memory (that is, Grass testified that Hollrah gave him none of the day's paperwork to assist him). Grass testified that he had had 11 deliveries and 4 pickups on April 30. Grass further testified that his trailer was supposed to be loaded by 9 a.m. on April 30, but loading did not begin until he arrived at 9 a.m., and then the trailer was loaded backwards.⁴ Grass made the points that the loading was late and backwards in his May 2 statement to Hollrah.⁵ After Grass completed his statement, Hollrah told Grass to write five

⁴ That is, freight that should have been at the end of the trailer, to be dropped off at Grass' first (nearest-to-the-terminal) stop was instead loaded in the nose of the trailer; freight that should have been in the nose of the trailer, to be dropped off at more remote stops, was at the end. So Grass had to drive his route in reverse order.

⁵ Hollrah, on cross-examination, agreed that Grass' trailer had been loaded backwards on April 30.

more statements in response to specific questions about his itinerary for April 30 (where he was, when, and why). Grass' statements about his April 30 itinerary are replete with errors and palpable contradictions. On cross-examination, Grass admitted that some his statements "seem like [] irreconcilable inconsistencies," even to himself.

Grass had failed to make a delivery to Aderhon Coatings Company on April 30. Grass testified that he did not do so because he did not have enough time to get to Aderhon Coatings before its receiving department closed at 3:30 p.m. He indicated such in his statements to Hollrah on May 2. The Respondent's internal auditing procedures allow 28 specified excuses for nondelivery of freight, one of which is that a customer was closed after 3 p.m. To that end, a box on the driver's freight bill is available for checking if a "Carrier-related failure" was a result of the fact that a customer was "Closed after 3:00 p.m." Grass acknowledged at trial that he checked this box for Aderhon Coatings, even though Aderhon Coatings stayed open until 3:30 p.m. Grass testified that he did so because Merritt told him to when he (Grass) called in to say that he could not get to Aderhon Coatings by 3:30 p.m. Grass also stated such in his May 2 statements to Hollrah. Grass also failed to make a delivery to Fisher Services Company on April 30; he testified that Merritt also told him to return with that load on April 30, and he so stated in his statements to Hollrah on May 2.

During the May 2 interview, Hollrah also told Grass to write a statement of where he was on April 30 between 3:17 and 4:17 p.m. because the paperwork that Grass had turned in showed no work for that period. Grass wrote a part-repetition of what he had written before, but he did not account for the time. Grass testified that he was actually delayed during that period at Thomas Dodge dealership because an item that he was told to pick up there was not ready; Grass further testified that he called Merritt to report the problem and Merritt told him that the pickup assignment would be erased from the computer. (And that would explain why Thomas Dodge did not show up on any of the paperwork that was generated during and after Grass' April 30 itinerary.) Grass, however, did not mention Thomas Dodge in the statements that he gave to Hollrah on May 2 to explain the unaccounted-for hour.

Further on May 2, Hollrah reviewed Grass' written answers and some of the receipts and other paperwork that the Respondent then had about Grass' April 30 itinerary. Hollrah then told Grass that he was suspended pending an investigation. Grass asked why, and Hollrah responded that it appeared that he did not do any work between 3:17 and 4:17 p.m. on April 30. Grass testified that he then gave Hollrah another explanation for the missing hour. After that explanation (which did not, in fact, account for the missing time), Hollrah told Grass that he was nevertheless suspended. On May 15, upon Hollrah's request, Grass came to the Chicago Heights terminal. Hollrah told Grass that he was discharged and gave him forms for protesting the action under the Respondent's internal grievance procedure.⁶

⁶ On cross-examination, Grass acknowledged that, although he filed a grievance under the Respondent's internal system, he failed to appear at the Chicago Heights terminal for a telephone conference call that

On cross-examination, Grass was taken through his itinerary for April 30. On each freight bill for each consignee, a driver enters his arrival and departure times. At the end of each day, office personnel collect each driver's freight bills and make a computer listing of his (or her) arrival and departure times at each stop. The listing is entered on a "driver detail" report. That report also includes what the driver has separately reported, in writing, as the period in which he took his 30-minute (unpaid) lunch. Although drivers' reports of when they take their lunches are routinely destroyed at the end of each day, Grass did not dispute that he reported on April 30 that he took lunch from 1:18 until 1:48 p.m. On cross-examination, Grass agreed that the driver detail report therefore indicated that he was "at two places at one time." On redirect examination, Grass testified that his statement that he was at Auburn Corporation between 1:41 and 1:47 p.m., and his statements to that effect and that he had lunch between 1:18 and 1:48 p.m. were "both true." Grass explained that he usually carries his lunch with him and, on April 30, "I cut my lunch short because of the workload." Grass acknowledged that, when he takes no lunch, he is to state "no lunch" on a separate report (that, again, is not retained by the Respondent), but he testified that he did not recall if he did so on April 30. Grass acknowledged that he failed to make deliveries at Fisher Services and Aderhon Coatings on April 30, but he attributed those failures to his late start in the day, or the fact that the freight for those customers was blocked in by pickups he had made during the day, or both.

Grass was also cross-examined about his testimony that on December 29, 2001 (not January 12, 2002, or at any other time), at Bally's Health Club, in the presence of Geanopoulos, Despaltro told him that: (1) the employees were making a big mistake if they affiliated with the Union, and (2) the Respondent would close if they did so. First, Grass acknowledged that, shortly after his discharge on May 15, he drafted and signed, and had Geanopoulos sign as "witness," an undated statement that on January 12 Despaltro told him, in the presence of Geanopoulos, that the employees were making a mistake; the undated statement, however, says nothing about a threat to close. Grass agreed that he had included in the undated statement "everything that [he] thought was important." Second, Grass acknowledged that, when he gave an affidavit to the Board investigator on May 28, he stated that on January 12, Despaltro, in the presence of Geanopoulos, made her "mistake" statement, but the affidavit does not mention any threat to close. Moreover, the affidavit states, "We continued talking for a few more minutes, but nothing more was said by either of us about the union drive." Third, Grass acknowledged that he did not tell the General Counsel about Despaltro's alleged threat to close until he gave another affidavit on November 12, 2002. It was after that affidavit that the General Counsel issued the amended complaint, alleging for the first time that the Respon-

was part of the process. Grass testified that he had just started working elsewhere and he did not want to take the time off.

dent had violated Section 8(a)(1) by Despalto's making a threat to close.⁷

The General Counsel also called as a witness one Robert T. Paulsen who was employed by the Respondent from December 1996 until October 2002. Paulsen testified that he was the Respondent's "operations supervisor" at the time that he ceased employment with the Respondent, but that he was originally hired as a driver. According to Paulsen, 4 or 5 months before Grass' discharge on May 15, "[I]nformation got out" that Grass was engaging in union activities. At the time, Paulsen met with dispatcher Bill Hawkins and Steve Cawgill, also an operations manager at the Chicago Heights terminal. In the meeting Hawkins said, "We need to keep an eye on Mr. Grass. . . . make sure he's doing everything out there right." Paulsen told Hawkins, "I'm not going to be a headhunter for this company and fire people for no reason." Paulsen testified that 2 minutes later he was called into Hollrah's office. According to Paulsen:

Art asked me why . . . I . . . had the response of saying that I was not going to head hunt anybody's job.

And I told him, "Look Art, I have been a union driver before I worked here, [and] I have been a supervisor. I'd just as soon stay out of the whole thing. I'm just keeping a low profile on the situation, and I do not like the way that this was going on, and I'm just not going to do it." . . .

He said, "Well, that's not what we want you to do."

...

I said, "Okay, that's fine, because I'm not going to."

On cross-examination, Paulsen acknowledged that the Respondent suspected Grass of running up extra hours (milking the clock) and that it would not be surprising that a manager would suggest keeping an eye on a driver who was suspected of doing such, but he denied that those suspicions about Grass were mentioned during these exchanges.

2. The Respondent's evidence

Despalto testified that during some of the occasions that she encountered Grass at the gym they discussed the Union's organizational attempt at the Chicago terminals. Despalto further acknowledged that during such a conversation in December, Grass showed her the newspaper copy with the "UNION YES" sticker on it. Despalto, however, flatly denied that Grass' doing so indicated to her whether he was supporting the Union. Despalto also flatly denied that she ever told Grass that the Respondent would close the facility if the Union were selected by the employees. Despalto did, however, acknowledge that she once told Grass, "I said I think you guys are making a mistake wanting the Union." Despalto further denied that she had any involvement in Grass' termination.

Julie Rosinko is the Respondent's account manager at the Respondent's Chicago Heights terminal. Rosinko testified that on May 1 she received calls from two customers who complained about not having received deliveries on April 30. The individuals who complained, she testified, were Estella Servin at Fisher Services Company and Jim Wilder at Aderhon Coat-

ings. Rosinko testified that she told Servin and Wilder that the driver had indicated on his paperwork that the freight had been returned because the Respondent had closed before 3 p.m. Rosinko further testified that she immediately reported the matter to Hollrah; Hollrah told her to confirm her report by e-mail to him, which she did. On cross-examination, Rosinko testified that Wilder had been "upset," and that Servin had been "very upset" because of the Respondent's failure to make the scheduled deliveries on April 30.

Hollrah denied knowing anything about Grass' prounion sympathies or activities. Hollrah testified that after he received Rosinko's e-mail he looked up the records for Grass' work of April 30, and he called Grass in and asked him to write a statement about his itinerary for April 30 in order to find out "why we had brought the freight back" from Aderhon Coatings and Fisher Services. When discrepancies within Grass' first statement and the discrepancies between Grass' first statement and the Respondent's paperwork became apparent, Hollrah asked for five more statements. Hollrah testified that he was concerned because Grass blamed the lost hour (again, between 3:17 and 4:17 p.m.) of his April 30 itinerary on then being at Strnad Rivet Company, although his April 30 report showed that he was there much earlier in the day. Hollrah testified that he pointed out other discrepancies to Grass and "I showed him all the paperwork" including the times that Grass had entered.⁸ Grass, however, still could not reconcile his errors and misstatements. At one point during the process, Hollrah agreed, Grass told Hollrah that Merritt had told him to enter on his paperwork that Aderhon Coatings and Fisher Services were closed after 3 p.m., even though Aderhon Coatings is open until 3:30 p.m. and Fisher Services is open all night. At another point, Grass blamed lack of deliveries on the fact that he had picked up merchandise that had blocked him from unloading for deliveries, but after reviewing the itinerary Hollrah did not think that that was possible. Hollrah testified that he concluded the interview by telling Grass that he was suspended because "there were a lot of inconsistencies in what happened [and] I was concerned over the fact that he had a lie on a return authorization slip."

Hollrah further testified that he later conferred with Merritt who denied that he had told Grass to report falsely that the deliveries to Aderhon Coatings and Fisher Services were not made because those customers were closed after 3 p.m. Hollrah testified that he believed Merritt because of all the inconsistencies in Grass' statements.

Hollrah testified that he conferred with his superiors, Boyle (again, the Respondent's regional vice president) and Stuart Baxter, the Respondent's divisional manager of human resources. After giving them all of the facts, Hollrah recommended that Grass be discharged. Boyle and Baxter agreed. Hollrah was asked for the basis of the decision, and he testified that he (and Baxter and Boyle) decided:

... [t]hat Tommy was untruthful in his statements, that Tommy had lied on a return form and that he couldn't explain his times. And because of that, he was being terminated for

⁷ Ultimately, I recommend dismissal of the threat-to-close allegation, but for possible purposes of review I state here that I credit Geanopoulos' testimony that the Bally's incident occurred in mid-December.

⁸ I credit Hollrah's testimony that he showed Grass the paperwork that he reviewed during the May 2 investigation.

giving misleading information, lying, falsification of Company documents and just out and out lying.

When asked why Grass was not afforded the steps of a progressive disciplinary system that the Respondent has established, Hollrah referred to the policy's statement that the system is not available for employees who are accused of serious offenses including "Dishonesty, [or? by?] providing false or misleading information." Hollrah further testified:

In a case like this where we have something where it's a lie to the customer, we just can't have a customer thinking our integrity is impugned at all. The customers, you know, they entrust us to haul their goods and if they can't rely on us to tell the truth, they have no reason for us to haul their product.

I was constrained to ask:

ADMIN. LAW JUDGE EVANS: What was the lie to the customer?

THE WITNESS: That the receiving closed before 3:00 o'clock. He marked on the return form that the customer; see, the customer can see copies on our history, the customer can actually see a copy of the reason why that freight was brought back.

ADMIN. LAW JUDGE EVANS: So, if the customer looked it up [on a computer access] he would find a false statement that he closed at 3:00 o'clock?

THE WITNESS: Correct.

ADMIN. LAW JUDGE EVANS: Next question.

On cross-examination, Hollrah was asked:

Q. The investigation of Tommy Grass, regarding the incident on April 30th, occurred because of these two customers' complaints. Is that correct?

A. Yes.

Hollrah was further asked on cross-examination:

Q. Okay. How often would you estimate that the Chicago Heights facility receives returns from drivers? . . . [I]s it daily? Weekly? Monthly?

A. There's normally, every day there's a return of⁹ several. Depends on the day, depends on the reason. There's, I think, 15 different reasons that freight can be brought back. So, there's plenty of reasons. So there's freight that's brought back a lot.

At another point, Hollrah agreed readily that: "Tommy was a good driver. Tommy had good numbers." Hollrah further agreed that Grass had no prior record of discipline.

Boyle testified that he reviewed all of the paperwork that Hollrah submitted to him and that he agreed with the decision to discharge Grass on the bases of the paperwork and Hollrah's report. Boyle denied knowing that Grass favored the Union, but he added that Grass would have been terminated, even if he had not been in favor of the Union, because: "This was a case of dishonesty. We let our customers down. We gave them false information. They entrust us with their product. And any case

of dishonesty, there is no other course of action." I was also constrained to ask, and Boyle testified:

ADMIN. LAW JUDGE EVANS: What false information was the customer given?

MR. BOYLE: When they called to ask what happened to their shipments, we told them that we had not been able to deliver [to] them because they closed at 3:00 o'clock in the afternoon.

Merritt denied that on April 30 he told Grass to mark his paperwork for Aderhon Coatings and Fisher Services as not deliverable because the customers had closed before 3 p.m. Merritt did not deny Grass' testimony that Grass told Merritt during the day that he had lost an hour at Thomas Dodge and that Merritt replied that he (Merritt) would have the pickup erased from the computer.

3. The General Counsel's rebuttal evidence

In rebuttal, the General Counsel called James Wilder, shipping and receiving manager of Aderhon Coatings, and Estela Servin, utility technician of Fisher Services. Both Wilder and Servin flatly denied Rosinko's testimony that they called her to complain about the deliveries that were not made on April 30.

B. Analysis and Conclusions

The complaint alleges that the Respondent violated Section 8(a)(3) by suspending Grass on May 2, and by discharging him on May 15, in order to discourage the union activities of its employees. In order to establish a prima facie case of such alleged unlawful discrimination, the General Counsel must persuade the Board that antiunion sentiment, or animus, was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

As evidence of animus, the General Counsel relies foremost on the allegation that Despaltro threatened Grass with plant closure. The original complaint, which issued on August 23, 2002, did not have this allegation; the allegation did not appear until issuance of the amended complaint on February 18, 2003. The delay is explained in part by the fact that Grass did not tell the General Counsel of such an event until his affidavit of November 24. Grass gave that affidavit, however, 6 months after he had sworn in another affidavit that, although Despaltro had once told him that the employees were making a "mistake" by seeking representation by the Union, at that time "nothing more was said by either of us about the union drive." Grass further testified that Geanopoulos was present at the time, but Geanopoulos failed to testify that Despaltro made any such threat. Despaltro denied that she considered Grass to be prounion, even after admitting that Grass had once given her a newspaper article that bore a large "UNION YES" sticker. For that reason, I am quite suspicious of Despaltro's overall veracity. However, I simply cannot credit Grass on this point. A threat to close is a threat not only to the employee who hears it; it is a

⁹ The Tr., p. 266, L. 10, is corrected to change "or" to "of."

threat to all of the employee's coworkers. Short of a threat of physical violence, therefore, a threat to close would probably impact an employee more than any other type of threat and is most likely *never* to be forgotten. Nevertheless, Grass not only left Despaltro's alleged threat to close out of the undated statement that Geanopoulos signed as a witness, Grass also left it out of his May 28 affidavit, and in that affidavit he, in effect, swore that no such threat was made. This conflict is irreconcilable.¹⁰ I therefore cannot credit Grass' testimony that Despaltro made the threat to close. Instead, I credit Grass' May 28 affidavit wherein it states that "nothing more was said by either of us about the union drive" after Despaltro told Grass that the employees were making a mistake by seeking union representation.¹¹ I shall therefore recommend dismissal of this allegation of the amended complaint.¹²

Geanopoulos did testify that, "two or three weeks before" New Year's Day, he was present when Despaltro approached Grass and said that "you guys . . . are making a big mistake with this union thing." (aff) And Despaltro admitted as much. On brief, the General Counsel argues that the admitted statement is evidence of animus that satisfies her *Wright Line* burden. I disagree. The Board has held that an employer violates Section 8(a)(1) by telling its employees that they are making a mistake *because union representation may cost them their jobs*,¹³ but the Board has not held that an employer's telling employees that they are making a mistake by seeking union representation, of itself, is evidence of antiunion animus. I further believe that the Board is unlikely to do so because the statement is nothing more than an argument that the employer believes that the employees would be better off without a union; as such it is nothing more than fair argument of the employer's position. I therefore disagree with the General Counsel's argument that animus sufficient to satisfy the requirement of *Wright Line* is found in Despaltro's statement to Grass that the employees were making a mistake by seeking union representation.

Nevertheless, I do find in the record credible evidence of Grass' prounion sympathies and the Respondent's knowledge of, and unlawful animus toward, those sympathies. Grass was credible in his testimony that he consistently argued the Union's position in discussions with Despaltro when they saw each other at the health club. Moreover, Geanopoulos corroborated Grass' testimony in this regard by testifying that, on at least one occasion (in December, after Despaltro told Grass that the employees were making a mistake by seeking union representation), Grass argued that the employees needed a union and gave Despaltro "reasons why." Additionally, Merritt did not deny Grass' testimony that, in February, Merritt concluded an

argument by asking (rhetorically) if Grass were not really upset "[b]ecause the Union didn't get in." These exchanges between Grass and these supervisors are adequate proof of the Respondent's knowledge of Grass' prounion sympathies during the 2001 campaign.

Also, Paulsen, who was the Respondent's operations supervisor until he terminated in October, testified that 4 or 5 months before Grass was discharged "information got out" that Grass was engaging in union activities. At the time, he and dispatcher Hawkins and operations manager Cawgill had a discussion in which Hawkins said, "We need to keep an eye on Mr. Grass. . . . make sure he's doing everything out there right." Paulsen, obviously knowing that Hawkins was not just referring to Grass' performance (which, again, Hollrah testified was "good") replied to Hawkins that, "I'm not going to be a headhunter for this company and fire people for no reason." Paulsen was immediately called on Hollrah's carpet and asked what Paulsen had meant by his statement. Paulsen told Hollrah that he had once been a "union driver" and that he was not going to fire any employee for also being one. Hollrah did assure Paulsen that the Respondent did not want Paulsen to fire anyone for prounion sympathies, and that fact can be said to significantly dilute any evidence of animus that was implied by the statement of Hollrah's subordinate, Hawkins. Nevertheless, the exchange is at least further proof that the Respondent's supervisors were aware of Grass' prounion sympathies and activities.

The necessary element of animus is found in Grass' undenied testimony that in February he approached Boyle in an attempt to have his regular route restored. Boyle, according to Grass, responded that he did not like Grass' attitude and that he would rather see Grass go work where he would be happy. Boyle, however, did not stop there. Boyle also warned Grass that, "I'm not going to have you stay here and ruin this Company. And you know what I'm talking about." Boyle, again, did not deny this testimony, and I found it credible. What Boyle was "talking about" is no mystery; at various stages of the hearing the Respondent's witnesses alluded to a suspicion that Grass was taking extra time to do his work, but in no sense did the Respondent's witnesses suggest anything that Grass might have been doing that would even theoretically "ruin" the Respondent. The only salient aspect of Grass' employment (besides good work, according to Hollrah) was his union activities which, as I have shown above, were well known to the Respondent's supervisors. And those activities were the only thing that Boyle could have been referring to. Boyle's statement that he was not going to let Grass "stay here" because of his prounion sympathies and activities was a blatant threat to discharge him for those sympathies and activities. Although not separately alleged as a violation of Section 8(a)(1), that threat by Boyle, a vice president of the Respondent, is more than enough proof of unlawful animus that would require the Respondent, under *Wright Line*, to go forward with evidence that it would have suspended and discharged Grass even absent his protected activities. Therefore, the defense asserted by the Respondent must be examined.

Hollrah testified that Grass was discharged for lying on his paperwork and lying in the statements that he gave during the

¹⁰ Certainly, the General Counsel makes no attempt at reconciliation or explanation on brief.

¹¹ *Alvin J. Bart & Co.*, 236 NLRB 242 (1978). I cited this case at the hearing, but on brief the General Counsel makes no suggestion why it would not apply.

¹² Because of my credibility resolution, I need not reach the Respondent's further argument that the allegation was barred by the 6-month limitations period of Sec. 10(b).

¹³ See, for example, *Vico Products Co.*, 336 NLRB 583 (2001), and *Carter & Sons Freightways*, 325 NLRB 433, 438 (1998).

Respondent's investigation of customer complaints about missed deliveries. And on brief the Respondent states that Grass was terminated "because Mr. Hollrah concluded Grass was dishonest about his whereabouts on Company time and why he returned to the customer center with freight he should have delivered to customers." I at least agree with the Respondent that Grass appeared to be untruthful in some of the answers that he gave during Hollrah's May 2 investigation. Nevertheless, the question must be asked: Why was Hollrah investigating Grass in the first place?

Hollrah testified that the Respondent's drivers return without making deliveries "several" times a day. Hollrah did not, however, testify that he investigates each return (or any returns). The return of loads that had been dispatched to Fisher Services and Aderhon Coatings on April 30 was therefore not the reason that Hollrah collected and reviewed Grass' paperwork, and the return of those loads was not the reason that Hollrah required Grass to answer interrogatories about his itinerary of that date. Indeed, Hollrah admitted that he undertook his investigation of Grass' April 30 itinerary solely because of Rosinko's report that two customers, Aderhon Coatings and Fisher Services, had complained about failing to receive deliveries. And Rosinko testified that Servin at Fisher Services and Wilder at Aderhon Coatings had, in fact, made those complaints. (Indeed, Rosinko testified that Wilder had been "upset," and that Servin had been "very upset" because of the missed April 30 deliveries.) Servin and Wilder, however, flatly denied that they made any such complaints. Servin and Wilder had no interest in this proceeding, and on brief the Respondent suggests no reason why they would have perjured themselves. I do not believe that they did. I credit their testimonies.¹⁴

In *Kidde, Inc.*, 294 NLRB 840 (1989), the employer secured evidence that the alleged discriminatee (also a driver) was stealing, but it did so only through an investigation that it undertook solely because that employee was organizing for a union. In *Kidde*, I found a Section 8(a)(3) violation, even though the respondent proved that the alleged discriminatee had, in fact, been stealing (incontrovertible photographic evidence was adduced at the hearing). In affirming my decision, the Board, at footnote 3, stated, "[W]e rely in particular on those cases holding that employee misconduct discovered during an investigation undertaken because of an employee's protected activity does not render a discharge lawful."¹⁵ The Board followed *Kidde* in *Supershuttle of Orange County, Inc.*, 339 NLRB No. 2 (2003). In *Supershuttle*, animus prompted an investigation of a prounion employee (also a driver). The alleged discriminatee made false statements during that investigation, and the employer claimed that it discharged him solely because he made those false statements. In rejecting the Respondent's position as

a *Wright Line* defense, the Board reasoned that: "Given the Respondent's unlawful motivation for investigating [the alleged discriminatee], the Respondent has created its own barrier to satisfying its burden of proof." The Board held that the misconduct that was discovered during the investigation that had itself been prompted by unlawful animus must be considered "no more than a pretext for the discipline in question."

In this case, the Respondent contends that it discharged Grass because he was false both before and during its investigation of customer complaints. Under the above cases, especially *Supershuttle*, the Board first looks at why an investigation of alleged employee misconduct took place before it passes on an employer contention that the employee was false during an investigation. Before the Respondent's investigation, Grass did show in his paperwork an overlap between his lunchtime and the time of a delivery, but the Respondent makes no suggestion that he did so to deceive the Respondent, or to deceive a customer, or to enrich himself. And the Respondent does not contend that the overlap would have been noted by Hollrah, and would have caused Hollrah to investigate Grass' conduct of April 30, absent the alleged customer complaints. Grass also showed in his pre-investigation paperwork a failure to account for one hour, but Merritt did not deny Grass' testimony that Grass had told him that he been delayed that amount by a pickup at Thomas Dodge. And the Respondent does not contend that the lost hour would have been noted and investigated by Hollrah absent the alleged customer complaints. And Grass also showed in his preinvestigation paperwork that Fisher Services and Aderhon Coatings had closed before 3 p.m. when they actually did not, but Grass credibly testified that Merritt told him to do such and, anyway, the customers could not have been deceived about their own closing times. And, again, the Respondent would not have routinely investigated Grass' report of the customers' closing times absent the alleged customer complaints. But, even if I agreed with the Respondent in all respects and found that Grass was inexcusably untruthful in his paperwork that he submitted before its investigation, the fact remains that the Respondent did not begin its investigation because of that untruthfulness. And, of course, the Respondent did not begin its investigation of Grass because Rosinko received customer complaints about missed deliveries because Rosinko received no such complaints. It is therefore apparent that the Respondent began its investigation for another reason.

The rationale of the Fourth Circuit Court in *Neptune Water Meter Co. v. NLRB*, 551 F.2d 568, 570 (1977), is helpful in determining the real reason that the Respondent began its investigation of Grass:

The rule is that if the employee has behaved badly it won't help him to adhere to the Union, and his employer's anti-union animus is not of controlling importance. But if the employee is a good worker and his breach of the work rules trivial, the more rational explanation for discharge may be invidious motivation. Such motivation can be found from the absence of any good cause for discharge. This must be so unless we are willing to assume something we know to be false: that businessmen hire and fire without any reason at all.

¹⁴ Rosinko is not a supervisor, and there is no logical reason that she would have fabricated her blatantly false testimony on her own. It is apparent to me that she would have done so only at the bidding of her superiors, Hollrah or someone higher.

¹⁵ The Board cited *Kut Rate Kid & Shop Kwik*, 246 NLRB 106, 121-122 (1979); *Campbell "66" Express*, 238 NLRB 953, 963 (1978), enf. denied 609 F.2d 312 (7th Cir. 1979); *Chrysler Corp.*, 242 NLRB 577 (1979); and *American Motors Corp.*, 214 NLRB 455 (1974), enf. 525 F.2d 695 (7th Cir. 1975).

Nor do businessmen (or businesswomen) begin investigations for no reason at all. Because the Respondent could not have begun its investigation of Grass because of a rather routine return of goods to the terminal, and because it could not have begun its investigation because of nonexistent customer complaints, it is apparent that the Respondent began its investigation for another reason—the “invidious motivation” of its proven antiunion animus. That is, I find that the Respondent began its investigation of Grass because it did not want Grass to “stay here” (Boyle’s words) and engage in union activities. Therefore, any misleading answers that Grass may have given during the investigation do not excuse his discharge.¹⁶

In summary, I find that the Respondent discharged Grass (a long-service employee who had good performance, according to Hollrah) on the basis of an investigation that was prompted solely by its unlawful animus. The Respondent’s asserted bases for its suspension and discharge of Grass are therefore, under the theory of *Kidde* and *Supershuttle*, to be considered no more than pretexts and, as such, they do not satisfy the Respondent’s burden under *Wright Line*. Accordingly, I conclude that by suspending Grass on May 2, and by discharging him on May 15, the Respondent has violated Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Respondent unlawfully discharged Grass, I shall order it to take certain additional affirmative actions designed to effectuate the policies of the Act. Specifically, I shall order the Respondent to offer Grass full reinstatement to his former job and to make him whole for any loss of earnings or other benefits that he has suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to remove from its files any and all references to Grass’ unlawful suspension and discharge and to notify Grass in writing that this has been done.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

ORDER

The National Labor Relations Board orders that the Respondent, FedEx Freight East, Inc., Chicago Heights, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, discharging, or otherwise discriminating against its employees because of their protected union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions that are necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Tommy Grass full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Tommy Grass whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any references to Tommy Grass’ suspension and discharge, and within 3 days thereafter notify him in writing that this has been done and that neither the suspension nor discharge will be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Chicago Heights, Illinois, copies of the attached notice marked “Appendix.”¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 2, 2002, the date of the first unfair labor practice found herein.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent had taken to comply.

Dated, Washington, D.C. July 22, 2003

¹⁶ Nor need I speculate how Grass’ May 2 answers may have differed had he not been required to drive his route backwards on April 30.

¹⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT suspend you or discharge you because of your membership in, or activities on behalf of, International Brotherhood of Teamsters, Local 710.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer Tommy Grass immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL Make him whole for any loss of earnings and other benefits resulting from our discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the May 2, 2002 suspension and the May 15, 2002 discharge of Tommy Grass, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

FEDEX FREIGHT EAST, INC.